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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 4 3

GATH P. FREEMAN, Trustee under the Will and of the Estate of Henry C. Starr, Deceased,

Appellant,

vs.

GILBERT K. HEWITT, Director of Gross Income Tax Division, Department of Treasury, State of Indiana,

Appellee.

APPELLANT'S SUPPLEMENTAL BRIEF ON REARGUMENT

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By the order of the Court set forth in its Journal for October 8th, 1945, page 7, Cause No. 4, the Court requested that counsel address themselves in their briefs and on oral argument to certain questions, which are hereinafter chronologically set forth as headings and subjects for discussion and argument as follows, to-wit:

1

Were the sales of securities as made in the circumstances of this case, including the transactions upon the New York Stock Exchange, interstate sales within the meaning and application of

Adams Mfg. Co. v. Storen, 304 U. S. 307; cf. McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33, 58?

For a discussion of this question and citation of authority the appellant refers to his original brief, pages 9-11 (Summary of Argument) and pages 30 to 40, line 5, inclusive (Argument).

The appellant believes that there are no new cases or authorities decisive of or bearing upon this question, since the case decided in 1944 of United States v. Southern Underwriters Association, 322 U. S. 533, referred to and discussed by appellant in his Reply Brief, page 5. In this latest decision of this Court it was held that the trafficking in insurance contracts across state lines constituted interstate commerce subject to regulation by Congress by virtue of the commerce clause.

If there were ever any serious or reasonable doubt that corporate stocks and bonds were proper subjects of commerce and interstate commerce, such doubt has long since been resolved both by the Court and by Congress. (Appellant's Original Brief, pages 33-40.) In providing for the regulation of the interstate traffic in corporate stocks and bonds by the enactment of the Securities and Exchange Act, the Congress recognized that such intangibles were proper subjects of commerce and interstate commerce and gave effect to its right to regulate the interstate traffic therein. And the Congress having acted in this matter and having assumed the control and regulation of such interstate business and having actually exercised its power in said respect under the commerce clause of the Constitution, the states are of necessity precluded from levying taxes or exercising other control or regulation inconsistent with or repugnant to such power of Congress.

If the commerce clause is to be preserved and the rights and powers of the Federal government under the commerce clause maintained, and if the same is not to be abandoned or completely nullified, it would seem that the encroachment of the states into the field of interstate regulation by taxation and otherwise will have to be curtailed. The commerce clause was designed to preserve the freedom of trade among the several states and the peoples thereof, without tariffs, duties, taxes or other levies imposed for whatever reason or motive by the states to thwart or hinder the same or preclude free intercourse and movement of trade and commerce anywhere within the national boundaries or with foreign countries.

Surely the trade in corporate stocks and bonds has attained such colossal proportions that it can not be seriously contended that the sales thereof in interstate commerce are not of the type of property intended to be within the purview of the commerce clause. The Constitution does not define or limit the kind of property intended to move freely in interstate trade, and there surely can be no doubt that it was intended that all property which is the subject of legitimate commerce should move freely in the channels of interstate trade. Why should one kind of property which is commonly and in great volume bartered and sold interstate be excluded from the protection of the commerce clause, while another kind of property is included therein? What possible circumstances could there be to require such a differentiation? Why should sales of stocks and bonds be taxed and sales of tangible property not taxed? By what quirk of logic could the rationale of the Adams case be applied only to manufactured goods or tangible property?

If commerce in securities among the states were subjected to state taxation such as the Indiana gross income tax,

the very object and purpose of the commerce clause would be defeated. There would be no free trade among the states, eventually no trade at all of stocks and bonds and securities, as it seems to be one of the frailties of human nature that the legislature of no state would permit that of any other to outdo it in the exercise of its power to tax. A tax by one state would suggest or provoke a tax by another. A rapacious desire would make it larger. Retaliations and reprisals would follow. Trade would come to a standstill and the Court would be engulfed with litigation. The same is true with respect to interstate commerce in tangible property, if the bars of the commerce clause were let down and such decisions as that of the Adams case and other cases upholding the commerce clause were overruled. To obviate this risk of a multiplicity of state tax burdens, to obviate the risk of a multiple burden to which local commerce is not exposed, to insure free trade among the states was and is the purpose and intent of the commerce clause. The extent and volume of interstate sales of securities has equalled or approached that of sales of tangible property. The Adams case, the Gwin, White & Prince case, the recent case of McLeod, Commissioner &c. v. J. E. Dilworth Co., 322 U. S. 327, 64 Sup. Ct. 1023, 1026, and a long unbroken line of decisions confirm this lofty purpose of the commerce clause. In the McLeod case, supra, the Court said:

> "The very purpose of the Commerce Clause was to create an area of free trade among the several States. That clause vested the power of taxing a transaction forming an unbroken process of interstate commerce in the Congress, not in the States." (64 Sup. Ct. 1023, 1026.)

The case of McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33, 60 Sup. Ct. 388, is readily distinguishable

from cases involving a double or multiple state tax burden, the court in that case saying:

> "This Court has uniformly sustained a tax imposed by the state of the buyer upon a sale of goods—effected by delivery to the purchaser upon arrival at destination after an interstate journey, both when the local seller has purchased the goods extra-state for the purpose of resale, (Citing cases) and when the extra-state seller has shipped them into the taxing state for sale there." (Citing cases) (60 Sup. Ct. 388, 394) (Appellant's brief, page 19).

The rationale of this decision is that the tax is upon the buyer and is analogous to a "use" tax or a property tax on property at its destination, the Court in this connection saying:

> "Its only relation to the commerce arises from the fact that immediately preceding transfer of possession to the purchaser within the state, which is the taxable event regardless of the time and place of passing title, the merchandise has been transported in interstate commerce and brought to its journey's end. Such a tax has no different effect upon interstate commerce than a tax upon the "use" of property which has just been moved in interstate commerce—(Citing cases) or the familiar property tax on goods by the state of destination at the conclusion of their interstate journey. (60 Sup. Ct. 388, 394.) * * *
>
> "Apart from these more fundamental considerations which we think are of controlling force in the application of the commerce clause, we find no adequate basis for distinguishing the present tax laid on the sale or purchase of goods upon their arrival at destination at the end of an interstate journey from the tax which may be laid in like fashion on the property itself. That the latter is a permissible tax has long been established by an unwavering line of authority." (60 Sup. Ct. 388, 395, 396.)

That intangibles such as stocks of foreign corporations and bonds are proper subjects of state property tax and similar taxes in the state of the domicile of the owner has long been the law in every state, supported by precedent in uniform and consistent decisions. Before sale or transfer in interstate commerce they are subject to such tax in the state of the seller, and upon consummation of sale and delivery they are subject to tax at the domicile of the buyer as the new owner. Stocks of foreign corporations and bonds have always been taxable to the owner at his domicile, in the absence of proof of a different taxable situs. Tangible property has always been taxable to the owner in the jurisdiction where the property is located. But either type of property is taxable to the new owner, the buyer, in the state of destination or the state of the buyer after an interstate sale and delivery.

The appellant feels that he has adequately argued these questions in his original brief, pages 21 to 29, showing that the state of the buyer or state of destination undoubtedly had the power to impose a property tax or similar tax upon intangibles such as corporate stocks and bonds at the end of an interstate journey or transfer in consummation of the interstate sale thereof (Appellant's reply brief, pages 8 to 13). The appellant points out that any state has the power to impose a property or similar tax on intangibles, and that the state of Indiana now has an intangibles tax which is in lieu of the general property tax and which is tantamount to a sales tax because upon the purchasing or acquiring of intangibles from out-of-state the tax immediately attaches on delivery to the purchaser in Indiana. And the appellant points out that other states have or could have similar tax laws respecting intangibles, and that the operation of such intangibles tax in this connection is so similar to a sales tax that the difference, if any, is in name

and not in substance. (Appellant's reply brief, pages 11 to 13.)

From a consideration of such cases as Berwind-White Coal Mining Co., supra, and other lucid and compelling opinions and decisions cited and discussed in appellant's original brief and reply brief herein, analyzing and declaring the rights and powers of states in the matter of taxation in connection with sales of property in interstate commerce, it is logically deducible that any state of destination or state of the buyer or where sale or delivery is consummated may levy a sales tax, a property tax or equivalent tax on any property or receipts of sales of any property which is a subject of commerce, whether tangible or intangible, with like effect and to the same extent regardless of whether tangible or intangible. There is no inherent difference in the ' xation of property, whether tangible or intangible, at least no difference so far as interstate commerce is concerned.

The Indiana gross income tax is as much an unconstitutional burden upon interstate sales of stocks and bonds or other intangible property as it is on interstate sales of tangible property. There is no difference in practical or legal effect. It is an additional burden on interstate commerce or trade in intangibles not borne by local commerce and is unconstitutional for the same reasons found and determined in the Adams case with respect to tangible property.

Therefore, the appellant respectfully submits that the sales of securities on the New York Stock Exchange, as made by the appellant in this case, were interstate sales within the meaning and application of Adams Mfg. Co. v. Storen, 304 U. S. 307; cf. McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33, 58, and other authorities cited and discussed by the appellant in his briefs herein.

2

Does the commerce clause forbid Indiana to levy a gross receipts tax upon the transactions in question, in the absence of any showing that a similar or substantial tax is, or may be, in fact laid upon them by any other state?

The appellant discusses at length in his original brief, pages 21 to 29, inclusive, the case of O'Kane v. State (1940), 283 N. Y. 439, 28 N. E. (2d) 905, cited by the State Court in its decision from which this appeal is taken (R. 34). The appellee had cited and relied upon the O'Kane case in the State Court.

On page 21 of appellant's original brief it is shown that the O'Kane case involved a stamp tax of the state of New York upon "all sales, or agreements to sell, or memoranda of sales and all deliveries or transfers of shares * * * whether made upon or shown by the books of the corporation * * *." The tax is 1½c per share sold for less than $20 and 2c per share sold for more (28 N. E. (2d) 905, 907).

In the stipulation of facts it is set forth that all of appellant's sales were handled in the usual and customary way of sales of intangibles through the New York Stock Exchange, and that the Court may take judicial notice of the manner and method of sales of securities on or through said New York Stock Exchange and the rules and regulations and laws governing sales of securities on or through said New York Stock Exchange (R. 17, 21), (Appellant's original brief, See Statement, page 3, third literary paragraph page 5).

The appellant respectfully submits that in addition to the O'Kane case cited by the State Court in its opinion and discussed by the appellant in his original brief, there is other showing in this case that a similar or substantial

tax was and is in fact laid upon sales or receipts from sales by the state of New York, as well as by the state of Indiana. It is common knowledge that the state of New York does tax all such transactions and that no member of the New York Stock Exchange is permitted under the law or the rules and regulations of the Exchange to consummate any sale thereon without collecting from the seller by withholding from the purchase price or otherwise the amount of tax payable to the state of New York. The practice is to withhold the amount of tax from the purchase price in settling with the seller. If the Court needs authority for considering such tax laws of New York State or of the state of the buyer or the rules and regulations of said Exchange, in determining the issue in this case, the authority is provided by the stipulation of facts herein (R. 17, 21).

However, it is the appellant's contention that it is not necessary to show or establish that a similar or substantial tax upon such gross receipts is in fact levied upon the same transaction by another state. No such showing was required in the Adams case, nor in Gwin, White & Prince v. Henneford et al. (1938), 305 U. S. 434, 59 Sup. Ct. 325, nor in any case yet decided by this Honorable Court. There was no evidence in the Adams case that any tax was paid to or in any other state by the seller, the J. D. Adams Mfg. Co., or by the buyers of its products, but it was implied, inferred or presumed by the Court that the property sold would be subject to property tax or similar tax in the state or states of delivery or destination. No specific proof of any such tax laws was required. And in the Gwin, White & Prince case this Court disposed of that suggestion or argument with the opinion and statement that:

> "Such a multiplication of state taxes, each measured by the volume of the commerce, would reestab-

> lish the barriers to interstate trade which it was the object of the commerce clause to remove. Unlawfulness of the burden depends upon its nature measured in terms of its capacity to obstruct interstate commerce, and not on the contingency that SOME OTHER STATE MAY FIRST HAVE SUBJECTED THE COMMERCE TO A LIKE BURDEN." (Our italics) (59 Sup. Ct. at pages 327, 328) (Appellant's original brief, third or last literary paragraph, page 25).

The question and subject of the risk of a multiplicity of state taxes, the risk of a multiple burden to which local commerce is not exposed, is discussed in appellant's original brief, pages 15 to 29, and in appellant's reply brief, pages 2 to 13.

So far as the appellant has been able to discover there is no logical basis and no precedent for the validation of a tax on gross receipts or measured by gross receipts in the state of the seller from interstate sales, although a tax in the state of the buyer or at destination where delivery is made is justifiable under the reasoning of the Berwind-White decision.

The securities in this case were delivered in New York (R. 20) (Appellant's original brief, pages 7, 42) on shipments by United States mail from Richmond, Indiana, on sales negotiated by interstate communication by telegraph in the usual course of sales and such business on the New York Stock Exchange. It was the responsibility of appellant to deliver at New York the securities sold, as agreed and intended by the appellant and the buyers and according to the rules of said New York Stock Exchange.

Therefore, it may be reasoned with impelling force, supported by impeccable precedent, that it is not necessary or requisite to show that a tax is in fact imposed or levied in the state of the buyer in order to invalidate a tax on the same transaction in the state of the seller. It is suf-

ficient to show, which usually can be implied or inferred, that the property sold in interstate commerce is subject to taxation in the state of destination or where the sale is consummated or delivery made. It would seem self-evident that any property, either tangible or intangible, which is a subject of commerce and interstate commerce would be a subject of state property tax or equivalent tax both in the state of the seller before sale and in the state of the buyer or at destination, as the case may be, after sale and delivery. The Constitution does not define the word "commerce," but as applied to trade it has been defined as the exchange of goods or property of any kind for money or for other goods or property. (Appellant's original brief, page 32.) The fact that the securities in this case were sold for a large aggregate amount of money (R. 18, 19; Appellant's original brief, page 5) is sufficient to show and establish that they were taxable and had taxable value immediately on delivery in the state of the buyer, in New York state or the state of destination for property tax or equivalent or similar tax which such state might see fit to impose. The Court would have the right to presume and to take judicial notice that such securities of substantial value would be so taxable in such state. It surely would not be necessary to make formal proof of such state tax laws. And if said securities were subject to such state taxation, and it would seem as a conclusion of law that they were, then a tax measured by gross receipts of the sales in the state of the seller must of necessity and by logical conclusion be unconstitutional and void, for it would constitute an additional burden on interstate commerce not borne by local commerce. The decision in the Adams case would apply with equal force to invalidate the Indiana gross income tax as applied to receipts from sales interstate of such securities as to the tangible property therein involved.

3

To what extent, if any, is Indiana's power to tax the gross receipts from these transactions affected, under the commerce clause, by the facts that domicile of the seller or situs of the securities prior to conclusion of the sales was in Indiana?

Indiana's power to tax gross receipts from an interstate sale of securities by a resident of Indiana to a resident of another state, as in this case, is completely precluded and abrogated by the commerce clause. The power to impose taxes on such commerce is vested in Congress, not in the states, under the decisions of this Court hereinabove and in appellant's original and reply briefs cited and discussed.

The question of situs has never been an issue in this case. The law of domicile and taxable situs of tangible and intangible property has not been and is not now in dispute. The Indiana domicile of appellant and Indiana situs of appellant's stocks and bonds were alleged in his complaint (R. 2-4) and in the stipulation of facts (R. 17, 21) to show the interstate character of his sales thereof, and for no other purpose. (Appellant's original brief, pages 40 to 43; Appellant's reply brief, pages 13, 14).

The discussion of the matter of situs and the rule "mobilia sequuntum personam" by the appellee in this case appears to be an abstruse and semantic dissertation on an uncontroverted subject of no probative value in this case. The matter is fully discussed in appellant's original brief, pages 40 to 43, and in his reply brief, pages 13, 14.

CONCLUSION

The appellant respectfully submits that for the reasons shown the decision of the Supreme Court of Indiana in this case should be reversed.

Respectfully submitted.

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